No. 13-1314

In the Supreme Court of the United States

ARIZONA STATE LEGISLATURE,

Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Arizona

BRIEF OF JACK N. RAKOVE, RICHARD R. BEEMAN, ALEXANDER KEYSSAR, PETER S. ONUF, AND ROSEMARIE ZAGARRI AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

CHARLES A. ROTHFELD
Counsel of Record
JOSEPH P. MINTA
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Amici Curiae

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STATEMENT OF INTEREST

Amici curiae are historians whose research interests include the origins and adoption of the Constitution and the evolution of American ideas about political representation, from the colonial era into the early decades of the federal Republic. *Amici curiae* believe that a historical understanding of American ideas of representation and the debate over specific provisions of the Constitution, as conducted by its framers and ratifiers, will assist the Court in considering the issues presented in this case.[1]

Jack N. Rakove is the William Robertson Coe Professor of History and American Studies and Professor of Political Science and (by courtesy) Law at Stanford University. His books include *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996), which received the Pulitzer Prize in History; *The Annotated U.S. Constitution and Declaration of Independence* (2009); and *Revolutionaries* (2010), which was a finalist for the George Washington Prize. He is past president of the Society for the History of the Early American Republic.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' blanket letters consenting to the filing of *amicus* briefs have been filed with the Clerk.

Richard R. Beeman, John Welsh Centennial Professor of History Emeritus at the University of Pennsylvania for forty-seven years, has written and edited thirteen books and several dozen articles on aspects of America's political and constitutional history in the eighteenth and early nineteenth centuries. His recent book, *Plain Honest Men: The Making of the American Constitution* (Random House, 2009), was winner of the George Washington Book Prize and the Literary Award of the Philadelphia Athenaeum. His annotated edition of the Declaration of Independence and U.S. Constitution, *The Penguin Guide to the United States Constitution*, was published in August, 2010. His newest book, *Our Lives, Our Fortunes and Our Sacred Honor: The Forging of American Independence, 1774-1776* (2013), describes the drama that played out within the Continental Congress between, September, 1774 and July 4, 1776.

Alexander Keyssar, the Matthew W. Stirling, Jr. Professor of History and Social Policy at Harvard University and chair of the politics faculty at the Kennedy School of Government, has specialized in historical issues that have contemporary policy implications. In 2000, he published *The Right to Vote: The Contested History of Democracy in the United States*, which received the Beveridge Prize of the American Historical Association for the best book in U.S. history; and was a finalist for the Pulitzer Prize in History and the Los Angeles Times Book Award. His 1986 book, *Out of Work: The First Century of Unemployment in Massachusetts*, was awarded three scholarly prizes and named one of the notable books of the year by the New York Times. He co-authored *The Way of the Ship: America's Maritime History Reenvisioned, 1600-2000* (2008), and *Inventing America* (2003, 2nd ed. 2006), a text integrating the histo-

ry of technology and science into the mainstream of American history. He has also published numerous op-ed articles publications.

Peter S. Onuf is the Thomas Jefferson Foundation Professor Emeritus in the Corcoran Department of History at the University of Virginia and Senior Research Fellow at the Robert H. Smith International Center for Jefferson Studies (Monticello). His recent work on Thomas Jefferson's political thought, culminating in *Jefferson's Empire: The Language of American Nationhood* (University Press of Virginia, 2000) and *The Mind of Thomas Jefferson* (University Press of Virginia 2007), grows out of earlier studies on the history of American federalism, foreign policy, and political economy. He is now collaborating with Annette Gordon-Reed on *"Most Blessed of Patriarchs": The Worlds of Thomas Jefferson* (forthcoming from Norton). Onuf was elected to the American Academy of Arts and Sciences in 2014.

Rosemarie Zagarri is University Professor and Professor of History at George Mason University. She is the author of many books and articles on the founding era of American history, including, *The Politics of Size: Representation in the United States*, 1776-1850 (1987); *A Woman's Dilemma: Mercy Otis Warren and the American Revolution* (1995); and *Revolutionary Backlash: Women and Politics in the Early American Republic* (2007). In 2009-2010 she was President of the Society for Historians of the Early American Republic.

INTRODUCTION AND SUMMARY OF ARGUMENT

A central question raised by this litigation is whether Article I, Section 4 of the Constitution pre-

cludes the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts. Such a commission would certainly have been a novelty to the eighteenth-century adopters of the Constitution. There was no direct precedent then for imagining the modern initiative process in which the people of a state exercise a legislative power that is fully equivalent to the statutory authority of an institutional legislature. The American revolutionaries were, of course, aware of the ways in which ancient and modern city-states had used procedures of direct democracy. But their constitutional experiments in the 1770s and 1780s were primarily concerned with the nature of political representation, operating first at the state and later at the national level of government. They inhabited a political world in which a commitment to the efficacy and indeed the justice of representation outweighed solicitude for the institutional privileges of legislatures.

That commitment is consistent with the concerns that have led the people of Arizona to transfer the specific power of redistricting from the institutional legislature to an independent commission. Eighteenth-century Americans understood that specific powers could be reassigned from one department of government to another. They also believed that the people themselves were the originating source of all the power of government. They were the true sovereign in the American understanding of republican government. It was fully within their power to relocate this authority from a state legislature that was perceived to have wielded it for politically improper purposes.

Claims about the adequacy of representation formed a significant point of controversy in the imperial debate of the late 1760s and early 1770s. The issue was not merely that Americans refused to accept the legislative sovereignty of a Parliament in which they were not actually represented. It was also that colonists shared the widely held view that the vaunted British constitution was also defective because too many members of the House of Commons sat for "rotten" and "pocket" boroughs that did not accurately represent the British people as a whole. Drawing upon ideas that had flourished in England during the 1640s, Americans held that a representative assembly—particularly the lower house of a bicameral legislature—should be a mirror or a miniature of the larger society. The conviction that Americans were indeed effectively or actually represented in their provincial legislatures, while Britons were so inadequately represented in Parliament, contributed to the American movement toward independence by identifying a profound difference in government between these two parts of the empire. The Americans were a people who practiced a system of "actual" representation that tied lawmakers and constituents closely together, while Britain relied on a system of "virtual representation" in which members of Parliament bore little responsibility to their constituencies.

With the adoption of new constitutions after 1776, Americans perfected this practice within the individual states. While authority flowed decisively toward the new legislatures, state declarations of rights affirmed that lawmakers should regularly return to the "private station" of citizen, the better to feel the impact of the laws they had enacted. Moreover, whenever the people concluded that government

was failing to answer its essential responsibilities, they retained the "indubitable, unalienable, indefeasible right, to reform, alter, or abolish it." Virginia Declaration of Rights Art. 3 (1776), 1 *Founders' Constitution* 6 (1987)). In the years after 1776, mounting dissatisfaction with the performance of the state legislatures marked a leading edge of the movement that culminated in the Federal Convention of 1787.

In 1787, as in 1776, Americans believed that the lower house of a legislature should closely resemble the larger society. That concern influenced the framing of the Times, Places, and Manner Clause (Article I, Section 4) of the Constitution. This clause was partly intended to deal with the potential danger of recalcitrant states refusing to fulfill their constitutional duty to provide for the legal election of members of Congress. But as the remarks of the clause's leading advocates, notably James Madison and Rufus King, indicate, the framers actively worried that state legislatures would misuse their authority in inequitable ways, significantly favoring some voters and disfavoring others. A concern with what we now call the one person, one vote principle of equal representation and the manipulation of the design of electoral districts for factious purposes was present in these debates, and it justified reducing the residual authority of the state legislatures over elections.[2]

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[2] Strikingly, James Madison was not only the first victim of term limits within the Continental Congress but also, in 1788, the first object of the practice later called gerrymandering (after his second Vice-President, Elbridge Gerry) when Patrick Henry, his great nemesis in Virginia politics, designed a congressional district that placed Madison's home county of Orange in what promised to be an Anti-Federalist-dominated seat.

The Times, Places, and Manner Clause proved a significant source of controversy during the ratification debates of 1787-1788. Some of this controversy reflected familiar motifs in the quarrel between Federalists and Anti-Federalists. The latter repeatedly predicted that Congress would deprive the mass of citizens of the suffrage by requiring voters for the House of Representatives to travel to distant corners of their states to cast their ballots. Anti-Federalists, however, said little about the sovereign rights of the state legislatures per se; they were more troubled by the array of abuses members of Congress could perpetrate, including arbitrarily lengthening their own terms of office. Federalists (again including Madison and King) stressed the problem of state noncompliance with their constitutional duty, but also identified other ways in which the state legislatures might threaten the political equality of citizens. In a few instances, Federalists even wondered whether senators would find ways to collude with their own electors in the state legislatures to weaken the popular right of representation in the lower House.

Anti-Federalists proposed amending the Constitution so that the congressional power to alter state "Regulations" would be exercised only when states refused to provide for the election of the House of Representatives; but the dominant Federalists refused to include this proposal in the amendments sent to the states in 1789. In the constitutional debates of the late 1780s, explicit efforts were made to restrict the operation of this clause to occasions when the states overtly refused or failed to comply with their duty to arrange for the election of members of Congress. Those efforts failed, and Federalists triumphantly vindicated a national power to oversee electoral questions that itself drew upon Americans'

commitment, dating at least to the 1760s, to maintaining a just system of political representation.

Beyond the controversy over Section 4, the ratification debates involved one other major subject that relates to the current controversy over the propriety of independent commissions exercising a legislative power over redistricting. In legitimating both the replacement of the amendment rules of the Articles of Confederation through the calling of popularly elected state conventions and the fundamental shift the Constitution made in the federal system, Federalists repeatedly evoked a doctrine of popular sovereignty that made the people themselves the primary source of constitutional authority. Following arguments best laid down by James Wilson of Pennsylvania, Federalists argued that the people always retained the right to "reform, alter, or abolish" existing forms of government. Acting at the federal level, they could reallocate authority between the Union and the States, as Article I, Section 4 promised to do in the realm of congressional elections. But the people could also do so within the boundaries of their own states. As the sovereign sources of the legal authority of their own governments, they retained a fundamental right to determine which institutions would exercise which powers. They were free to define how the legislative power of society would be formed. If they wished, they could restore the legislative veto to the executive. If circumstances warranted, a sovereign people could also shift specific legislative powers to other institutions.

Thus, while a specific conception of the people of a state establishing independent commissions through the initiative process was not yet available to Americans, the recognition of their capacity to al-

locate legislative power as they wished was consistent with the founding values of the Republic.

ARGUMENT

I. American ideas about the value of attaining proper and just forms of representation in a legislature were deeply embedded in the revolutionary controversy of 1765-1776.

When the framers of the Constitution took up the composition of the House of Representatives in 1787, they had no compelling precedent for the election of its members. In Britain the composition of the House of Commons rested on the tradition of two members for every county and the granting of the right of representation to chartered boroughs and other corporations. In the American colonies, representation was routinely given to legally defined communities—townships or counties—as they were organized. But because the framers intended to create a national legislature smaller than either the state legislatures or the House of Commons, they could not rely on these examples. Members of the House of Representatives could be elected either as statewide delegations or in artificial districts that would have no other legal purpose or political function. One could also imagine a hybrid system in which citizens across a state could vote for members of each of its individual districts. There was, in short, a great deal of experimental uncertainty over the election and composition of the House of Representatives. Jack Rakove, *The Structure of Politics at the Accession of George Washington*, in Richard Beeman et al. eds., *Beyond Confederation: Origins of the Constitution and American National Identity* 288-289 (1987).

Nevertheless, American ideas about representation rested on a rich tradition of historical practice and political controversy, particularly the quarrel with Great Britain that erupted with the Stamp Act (1765). In that dispute, advocates for the British government argued that the colonists were "virtually" represented in Parliament, even though no Americans sat in the House of Commons. Numerous communities in Britain did not send members to the Commons, yet were legally bound by its decisions. Americans dismissed these claims scornfully. As the Massachusetts radical James Otis pointedly asked, "To what purpose is it to ring everlasting changes to the colonists on the cases of Manchester, Birmingham, and Sheffield, which return no members? If those, now so considerable, places are not represented, they ought to be." James Otis, *Considerations on Behalf of the Colonists* (1765), quoted in Bernard Bailyn, *Ideological Origins of the American Revolution* 169 (1992).

In rejecting these claims, the colonists were well aware of the manifest deficiencies of representation in Britain. Those deficiencies were not a novelty in 1765: John Locke, for example, had alluded to them in his *Second Treatise of Government* (1690). John Locke, *Two Treatises of Government*, Sec. 157, at 372-373 (Peter Laslett ed. 1960, 1988). Americans were drawn to the view that Britain's vaunted constitution was, in fact, decaying. Too many members of the Commons sat for "rotten boroughs" with few voters or "pocket boroughs" in which electors were easily controlled by a dominant government or aristocratic interest. Even during the Stamp Act disputes, some members of Parliament, notably including William Pitt, freely criticized the inadequacies of representation in the House of Commons and agreed

that Americans could not be taxed by a legislature in which they held no seats. By contrast, Americans knew that in their societies new communities regularly received the right of representation, while the limitations on the suffrage that sharply constricted the British electorate had only a modest impact in the colonies. See generally Bailyn, *Ideological Origins*, at 161-175.

Drawing upon ideas that originated during the mid-seventeenth-century English civil war and Commonwealth, the colonists agreed that a proper legislative assembly should closely resemble the society from which it was drawn. See Eric Nelson, *The Royalist Revolution: Monarchy and the American Founding* (2014) at 71-75. As John Adams observed in his *Thoughts on Government* 10 (1776), "The principal Difficulty lies, and the greatest Care should be employed in constituting this representative assembly. It should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them." Such an assembly, Adams added, should provide "an equal Representation of the People, or, in other Words, equal Interests among the People, Should have equal Interests in the Representative Body." 1 *Founders' Constitution*, at 108. These concerns, drawing on distant English sources, became a commonplace for the American revolutionaries after 1776, to be repeated during the constitutional debates of 1787-1788. See Rakove, *Original Meanings*, at 203-205.

This conscious attachment to the differences in American and British practices of representation had two significant consequences for the course of the Revolution.

First, it sharpened colonial convictions about the extent of the quarrel between Britain and America. In the mother country, representation had become a corrupt, influence-driven process, working to the advantage of a Crown and ministry that dominated the government. By contrast, Americans conceived political representation as a process that should narrow the distance between voters and legislators, leaving representatives directly receptive to the concerns and even the instructions of their electors, and turning the legislative assembly into a miniature of the larger society. Where British members of Parliament were urged, in the words of Edmund Burke, to think of themselves as "a *deliberative* assembly of *one* nation, with *one* interest, that of the whole," American norms and practices pointed in a different direction, toward the idea that representatives were essentially attorneys for their constituents' interests and preferences. Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), in 1 *Founders' Constitution*, at 394; Bailyn, *Ideological Origins*, at 162-165.

Second, this commitment to principles of equal representation identifies a critical theme in American norms of self-government. In the constitutional quarrel with Britain, the colonists treated their individual legislative assemblies as the virtual equivalent of Parliament, as possessors of legislative sovereignty within their own jurisdictions. In the years before 1776, Americans principally struggled to have their provincial assemblies treated as mini-versions of Parliament. But after 1776, for purposes of their own governance, the American belief in the superiority of their practice of representation also exposed the state legislatures to pressure from below, making the legislatures' claim to legal sovereignty subject to new demands and pressures that had not been ex-

pressed previously. The more these demands were expressed, the more difficult it became to treat the legislatures as the true locus of a state's sovereignty.

II. In the decade after 1776, political developments within the states increasingly supported the idea that sovereignty rested not in the government of the states but among the people themselves.

There is no question that the new state legislatures created in 1776 became the principal repository of the sovereign authority of republican government. Although the executive and judicial branches of government gained full departmental independence, they were the weaker branches, decidedly inferior in authority to the politically dominant legislature. Even so, over the course of the next decade a wide array of developments operated to weaken the primary stature of the state legislatures.

The belief that state legislatures were only trustees of the people's authority, rather than the sovereign source of law that had effectively supplanted the king, was evident in the declarations of rights that often accompanied the constitutions. Statements of principle found in the Virginia constitution of May 1776 are paradigmatic. While the Virginia constitution itself imposed no term limits on legislators, Article 5 of the Declaration of Rights affirmed the principle of rotation in office: "that the members of [the Legislative and Executive powers of the State] may be restrained from oppression, by feeling and participating [in] the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the

former members, to be again eligible, or ineligible, as the law shall direct." 1 *Founders' Constitution*, at 6. More generally, a staple maxim of revolutionary-era politics held that "when annual elections end, slavery begins." Here again the American reliance on the efficacy of representative government ran at least as strong as the belief in legislative supremacy.

In the decade after 1776, constitutional developments within the states further illustrated the dilution of legislative supremacy. Although the constitutions written in 1776 limited the executive to annual terms while depriving governors of their veto—a power royal governors long wielded—the New York constitution of 1777 and the Massachusetts constitution of 1780 restored the veto to the executive while enabling governors to be elected at large by the people. Section 15 of the Pennsylvania Constitution of 1776 required pending bills to be "printed for the consideration of the people" and ideally to be held over until the next session of the assembly before enactment. Massachusetts also pioneered the concept of assembling a separate convention to frame a constitution that would then be submitted to the people for ratification. That development arose only after its legislature attempted to promulgate a constitution it had written, sparking opposition from many Massachusetts towns. See generally Rakove, *Original Meanings*, at 96-101; Gordon Wood, *The Creation of the American Republic, 1776-1787* 339-341 (1969). Moreover, the concept of the judicial review of legislation began to emerge, slowly but potently, within the states. Taken together, these developments indicated a growing movement away from the concept of legislative sovereignty within the individual states.

Beyond these constitutional developments, there is ample evidence of the growth of an early form of political populism after 1776. The distinguished historian Gordon Wood explores this development at length in his epochal work, *The Creation of the American Republic, 1776-1787*. In the mid-1780s the greatest challenge to the sovereignty of the states came, Wood argues, not from nationalists eager to augment the authority of the Continental Congress, but rather "from below, that is, from the repeated and intensifying denials by various groups that the state legislatures adequately spoke for the people * * * . In the contest between the states and the Congress the ideological momentum of the Revolution lay with the states; but in the contest between the people and the state governments it decidedly lay with the people." Wood, *Creation of the American Republic*, at 362.[3]

By 1787, the idea that sovereignty vested in the people rather than the state governments became a potent weapon for the Federalist movement. An appeal to popular sovereignty could enable the Federal Convention to circumvent the formal amendment requirements of the Articles of Confederation, which required changes to be approved by a vote of all thirteen legislatures. Equally important, an attack on the concept of the states' legislative sovereignty would facilitate the transfer of authority from the states to the Union.

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[3] More generally, the analysis presented here draws extensively on Wood, *Creation of the American Republic*, at 306-389.

III. In diminishing the sovereign authority of the state legislatures by proposing the Times, Places, and Manner Clause, the framers of the Constitution were seeking to protect fundamental norms of equal representation.

The Times, Places, and Manner Clause originated in the Committee of Detail that met from July 26-August 5, 1787, charged with the task of converting the general resolutions the Convention had adopted thus far into the text of a working constitution. The Committee exercised a great deal of initiative, and its proposals significantly advanced the work of the Convention. In early drafts of this clause, the Committee provided that the time, place, and manner of holding elections for both houses would be "prescribed" by the state legislatures, but that these "Provisions" could be "altered or superseded" by Congress. The final report the Committee presented to the Convention on August 6 reduced the supervisory power of Congress to "altered." II Max Farrand ed., *Records of the Federal Convention of 1787* 139, 153, 155, 165, 179 (1937) [hereafter RFC].

The clause was actively debated on August 9. The convention first rejected a motion from James Madison and Gouverneur Morris to exempt the Senate from the clause. It then unanimously accepted the first part of the clause, validating the authority of the state legislatures, and turned to the second half, dealing with the supervisory authority of Congress. Two South Carolina delegates, Charles Pinckney and John Rutledge, moved to delete this part of the clause, and five delegates responded in its defense. II RFC, at 239-241.

The lengthiest and most comprehensive defense came (at least according to his own notes) from Madison. His speech deserves careful consideration, because it extended well beyond the possibility that jealous state legislatures might simply try to cripple Congress by refusing to arrange for elections. Madison began by noting that the very fact that the House would be elected by the people rather than the state legislatures indicated that the framers already agreed that "the result will be somewhat influenced by the mode" of election. It was the people who were meant to be represented, not the legislatures. That consideration alone justified recognizing "that the Legislatures of the States ought not to have the uncontrouled right of regulating the times places & manner of holding elections." Moreover, Madison continued,

> These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, sh[oul]d all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures, and might materially affect the appointments. Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was

> presumable that the Counties having the power in the former case would secure it to themselves in the latter.

II RFC, at 240-241.

The various concerns that Madison identified in this speech read the Times, Places, and Manner Clause as broadly as its language could possibly be interpreted. This analysis covered not only the ways in which voters would register their individual preferences, but also the entire framework by which a state would choose how its people would be represented. Madison assumed that existing inequalities in the composition of the state legislatures would produce comparable inequalities in the federal House. He also worried that state legislatures would seek to "mould" the electoral process, not to enable the people to secure the best representation for themselves, but to advance the legislature's own "favorite measure."

Madison's comments reflect the animus against the state legislatures that shaped his constitutional thinking in 1787. That attitude was clearly expressed in the documents drafted prior to the Convention. His April 1787 memorandum on the Vices of the Political System of the United States was a running indictment of state legislatures, which he faulted not only for their failure to implement the decisions of the Continental Congress, but also for the "multiplicity," "mutability," and worst, the "injustice" of their own legislation. 1 *Founders' Constitution* at 166-169. Madison was no defender of the residual sovereignty of the state legislatures, and his justification of the Times, Places, and Manner Clause was

fully consistent with that position.[4] By default, the state legislatures remained the most obvious and convenient institution for drafting appropriate regulations for congressional elections. But their judgment and preferences did not provide a sufficient basis for determining whether their citizens were indeed being adequately represented. Congressional supervision was necessary, not only to ensure that each state would remain represented in the national legislature, but also to improve (or one could say, perfect) the basis on which the electorate would be represented. This was a matter of justice as well as necessity, and Congress should be empowered to trench on state legislative authority to attain these ends.

One could question how well Madison's views represented those of other framers. None of the other four speakers on August 9 went as far as he did in identifying the potential uses of the clause. But neither did Madison record anyone opposing his views. Instead, the Convention rejected the motion from Pinckney and Rutledge. It then accepted a new change in wording proposed by George Read of Delaware, replacing the phrase "provisions concerning them may, at any time, be altered by the Legislature of the United States" with "regulations, in each of the foregoing cases may at any time, be made or al-

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[4] As numerous Madison scholars have noted, his favorite proposal for the Constitution was to give the national legislature a negative on state laws, to be used at least to protect national laws against the interference of the states, but also, he hoped, to enable the national government to protect minorities within the states against unjust legislation. Had that measure been accepted, the idea that states retained legislative sovereignty would have grown absurd.

tered" by Congress. "This was meant to give the Natl. Legislature a power not only to alter the provisions of the States, but to make regulations in case the States should fail or refuse altogether." II RFC, at 242. The addition of "made" clearly implied that Congress had its own authority to initiate a wide array of electoral "regulations" independent of any prior action by the states.

This discussion largely determined the substance of the clause. Two changes were made, however, in the final days of the Convention. First, the Committee of Style revised the second part of the clause to read: "but the Congress may at any time by law make or alter such regulations." II RFC, at 592. Second, on September 14 the Convention unanimously added the phrase, "except as to the places of choosing Senators" at the very end of the clause, "in order to exempt the seats of Govt in the States from the power of Congress." *Id.* at 613.

Along with the Militia Clause of Article I, Section 8, the Times, Places, and Manner Clause was one of two provisions that explicitly authorized Congress to override or preempt a legislative power that states would ordinarily exercise. In this sense, it derogated from the residual sovereignty of the state legislatures, not as much as Madison's proposed negative on state laws would have done, but still in a realm of governance that dealt with a fundamental political characteristic of the states. As Madison's August 9 speech strongly indicates, the rationale for this provision extended beyond the necessity of denying the state governments the capacity to prevent the national legislature from meeting. Discussions of the mode of voting, or the different ways in which a state's delegation would be constituted, or the value

of protecting equality among the citizens all evoked longstanding American concerns with the substance and quality of representation, rather than the value of preserving a traditional legislative power for its own sake.

IV. The ratification debates of 1787-1788 confirm that concerns relating to the possible manipulation of congressional elections by the state legislatures continued to shape the interpretation of the Times, Places, and Manner Clause.

Article I, Section 4 proved to be a controversial feature of the Constitution during the ratification debates of 1787-1788. Starting with Massachusetts in January 1788, six states recommended its amendment. The typical formulation of these amendments would limit the congressional exercise of its power to "make or alter" election regulations to occasions when a state legislature "shall neglect or refuse to make Laws or Regulations for the purpose" or when some other event ("invasion or rebellion") would leave it "disabled" from acting. 10 Virginia Amendments to the Constitution, June 27, 1788, *Documentary History of the Ratification of the Constitution*, 1555 (1976) [hereafter DHRC]. In two cases, however—Massachusetts and New Hampshire—Congress would also have been authorized to act when a state "shall make regulations subversive of the rights of the people to a free & equal representation to Congress." Massachusetts Ratification, February 6, 1788, 6 DHRC, at 1469. Here, again, a concern with the purposes of political representation

would trump the sovereignty claims of a state legislature.[5]

Much of the debate over the clause rested on scenarios that are irrelevant to the concerns of this litigation. Anti-Federalists and Federalists speculated freely over the possibility that either Congress or the legislatures would enact laws requiring voters to travel enormous distances to cast their ballots in polling places situated in some far isolated precinct of a state. Pennsylvania voters might have to schlep their way to the shores of Lake Erie, where their commonwealth then owned only a bare strip of beachfront, while citizens of Massachusetts might have to wend their way either to Great-Barrington, near its western boundary with New York, or to Machias, which now sits in far northeastern Maine. 7 DHRC, at 1398-99. George Mason warned Virginians that even if the state should be divided into ten electoral districts, "as Gentlemen say (and in which I accord in all my heart," Congress might still require voters to cast their ballots in Norfolk, in the state's far southeastern corner. 10 DHRC, at 1291.

Less sensationally, numerous comments made during the ratification debate focused on the possibility that state legislatures would balk at holding elections. The specter of defiant states provided the most obvious reason for vesting this power in Congress. Federalists and Anti-Federalists batted this danger back and forth in terms that often echoed the rhetorical excesses of the ratification debate. The most extreme comments made by Anti-Federalists suggested that Congress could use its power to evade other con-

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[5] For the New York ratification convention's variation on this amendment, see 23 DHRC, at 2330-2331.

stitutional rules, manipulating its control over the time and manner of elections to convert fixed congressional terms into lifetime positions

Within this debate, however, some speakers in the state conventions did touch on issues that related more directly to fundamental principles of equal representation. In Massachusetts, where two days went to discussing this clause, several speakers argued that the clause was essential to enable the lower House, "the democratick branch of the national government, the branch chosen immediately by the people," to act as "a check on the federal branch." Without oversight by the House, the federal Senate might well collaborate with the state legislatures to "at first diminish, and finally annihilate that controul of the general government, which the people ought always to have through their immediate representatives." 6 DHRC, at 1217. Judge Francis Dana, formerly the American minister to Tsarina Catherine, told the convention that he was initially skeptical of the clause, but now saw its merits. "A State may make provision, but it may not be agreeable to the spirit of the Federal Constitution," Dana observed. "It is not enough that a State sends its complement of representatives, but all the people ought to have equal influence, and the State regulation is unequal and unjust." *Id.* at 1232.

Rufus King soon developed this point at greater length. The danger of inequality in representation was evident in several states. In neighboring Connecticut, representation in the state legislature was given solely to town corporations, independent of population. Rhode Island was widely believed to be preparing to adopt the same rule. Worse examples might be found in the southern states. In South Car-

olina there had been enormous growth in the backcountry. But that population's requests for greater representation were effectively blocked by the thirty members who sat for Charleston, out of all proportion to its relative population. *Id.* at 1279. In the Virginia convention, Madison pointed to South Carolina to illustrate a broader lesson. "Some States might regulate the elections on the principles of equality, and others might regulate them otherwise," Madison observed. "This diversity would be obviously unjust."

This concern with promoting norms of democratic equality thus remained part of the framework within which the framers and their Federalist supporters conceived the purposes of Article I, Section 4. One element of this concern was clearly addressed to the eighteenth-century equivalent of our modern notion of one person, one vote, and the conviction that electoral districts should be of equal size. But the political universe of the American revolutionaries was also filled with images of the way in which processes of deliberation and representation were subject to corruption. That was one of the great legacies they inherited from their pre-1776 belief that both the British House of Commons and the British electorate were the victims of multiple forms of corruption that had sapped the independence of Parliament and prevented it from performing its constitutional duties.

It is noteworthy that Madison and King acted as both framers and ratifiers of the Constitution. Both spoke during the August 9, 1787 debate on the clause, and both made similar remarks in the ratification conventions. There is, of course, no mechanism available to measure exactly how representative their opinions were (though Madison admittedly enjoys some deserved prestige in the adoption of the

Constitution). Nevertheless, the belief that the purposes of the clause transcended the unlikely scenario of recalcitrant states simply blocking the election of congressional delegations was manifestly one element—and hardly a trivial one—in the support that Federalists gave to the clause as written. The commitment of the dominant Federalists to protecting the substantive purposes of the representation of the people, rather than a desire to minimize the potential insult to the residual sovereignty of the state legislatures, remained the driving force in the ratification debates.

Had Federalists not held this position, or had he not felt so strongly about this issue, Madison could easily have included a conciliatory response to Anti-Federalist criticisms in the amendments he proposed to the House of Representatives on June 8, 1789. Madison did include two other measures relating to the election of the House of Representatives, and Congress ultimately included both in the twelve amendments it sent to the states in September 1789. However, on August 21, as the House was near the close of its deliberations on amendments, Aedaenus Burke of South Carolina introduced a revised version of the Times, Places, and Manner Clause based on the states' recommended amendments. Burke's proposal would restrict congressional power to those occasions when "any State shall refuse or neglect, or be unable, by invasion or rebellion, to make such election." The ensuing debate recapitulated the arguments made during the ratification debates. By a vote of 28-23, the House rejected Burke's amendment. 1 *Gayles and Seaton's Debates and Proceedings* 797-802 (1825).

Over the two years separating the report of the Committee of Detail of August 6, 1787, from the deliberations of the First Congress over constitutional amendments, the Times, Places, and Manner Clause remained a subject of active contestation. Two alternatives were repeatedly available to the framers, ratifiers, and the amenders of the Constitution: to restrict its operation only to occasions when the state legislatures manifestly defaulted on their constitutional duty, or to enable the new Congress to judge just how well different election schemes framed by the states were fulfilling deeper objectives of political representation. Although some state conventions had favored the former option, it failed to gain political acceptance. The dominant Federalist viewpoint instead prevailed. The substantive purposes of representation remained far more important than the legislative privileges of the states.

V. The ideas of popular sovereignty that coalesced in the United States in the late 1780s are fully consistent with the capacity of the people of a state, using the modern initiative process, to delegate a particular legislative power to an independent commission.

Beyond the specific discussions of the Times, Places, and Manner Clause, the ratification debates of 1787-1788 are relevant to the questions posed in this litigation in one further, critically important respect. The residual sovereignty of the state legislatures became vulnerable not only to limitations from above—that is, from assertions of federal supremacy over state legislation. It also became susceptible to modification from below—that is, from the idea that the people themselves, as the original possessors of

the sovereign authority of a republican polity, always remained free to reallocate the powers of government as they wished. Within both the individual states and the federal republic, the people became the ultimate sources of the delegated authority their governments exercised in their name. The highly creative development of American constitutional thinking in the long decade after 1776 had the effect of converting a somewhat abstract belief in the natural right of a people to "alter and abolish government" into a potent doctrine that now proved fundamental to the very form and substance of American constitutionalism. Once this doctrine was propounded and accepted, it could be applied to multiple purposes, including eventually the invention of the initiative process as a constructive response to the conviction that state legislatures no longer provided the best representation of a people's collective interests.

There were multiple sources for the transformation of the concept of popular sovereignty from abstract principle to constitutional doctrine. One came from the development of the distinctive American definition of a constitution as supreme fundamental law, contained in a document written by a specially appointed convention and then ratified through some direct expression of the popular will. Another evolved from the process that Gordon Wood has called "the disintegration of representation," a term that denotes the erosion of popular confidence in the capacity of effective governance by the revolutionary state legislatures. Wood, *Creation of the American Republic*, at 363-383.

The constitutional debates of the late 1780s advanced and crystallized this development in several substantial ways.

First, the framers of the Constitution and their Federalist supporters agreed that an appeal to the popular sovereignty of the people, as expressed through the ratification conventions in the separate states, would overcome any doubts about the abandonment of the amendment rules of the Articles of Confederation. This calculation gained decisive support throughout the states. Twelve of the thirteen legislatures enacted laws for the election of convention delegates, while Rhode Island, the one state not present at the Federal Convention, went the other states one better by submitting the proposed Constitution to a popular referendum. Rakove, *Original Meanings*, at 102-108.

Second, popularly elected ratification conventions provided a legal solution to the vexing problem of *quod leges posteriors priores contrarias abrogant*.[6] If the state constitutions (prior to Massachusetts) and the Articles of Confederation had received only legislative approval, as had been the case, then later meetings of the state legislatures remained free to ignore or violate their antecedents' constitutional commitments, as one legislature cannot bind a later one. By resting the authority of the proposed Constitution on the ratification conventions, which assembled for one purpose alone, rather than the legislatures, the framers and the Federalists established a sound theoretical foundation for the legal supremacy of the Constitution expressed generally in Article VI, and more pointedly in Article I, Section 4.

Third, and most important, this new conception of popular sovereignty offered a paradigmatic solu-

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[6] Or, later laws [statutes] contradicting earlier ones, abrogate them.

tion to the problem of federalism. Anti-Federalists repeatedly described the proposed Constitution as a vehicle for the consolidation of the federal union, with its diverse member states, into one concentrated government. There was some dispute as to how this consolidation would occur. Some Anti-Federalists argued that consolidation would occur simply because the national government, with its own three departments, would act directly on the American people, rather than having to work through the states. Others imagined an ongoing competition for power between the Union and the states that would end only when the national government prevailed and the states were left as empty jurisdictions, doing little more than holding elections under the condescending terms of the Times, Places, and Manner Clause. No polity could survive, Anti-Federalists argued, on the detested principle of *imperium in imperio* (a state within a state, or two claimants striving for sovereignty against each other). In either case, Anti-Federalists assumed that sovereignty would have to reside in one body or the other, but not in both. Rakove, *Original Meanings*, at 181-184.

The decisive refutation of this argument came from James Wilson, future member of the first Supreme Court, active member of the Pennsylvania delegation to the Federal Convention, and conspicuous leader of the dominant Federalist majority at his state's ratification convention. In a major speech to the state convention that soon became the basis of Federalist orthodoxy, Wilson challenged the existing conception of sovereignty. It was a mistake, he argued, to imagine that sovereignty, properly defined, belonged to government. In the American system, sovereignty belonged to the people themselves. They

could decide, and re-decide, how much power to allocate to the national government, how much to the states. "[I]n this country, the supreme, absolute, and uncontrollable power resides in the people at large; that they have vested certain proportions of this power in the state governments; but that the fee simple continues, resides, and remains with the body of the people." 2 DHRC, at 473) Wilson supported this claim by invoking the Declaration of Independence, with its Lockean statement of "the RIGHT of the people, to alter or to abolish" any form of government. See generally Wood, *Creation of the American Republic*, at 524-543.

Wilson's reformulation of the problem of sovereignty is noteworthy in several respects. First, to some extent Wilson was preserving the traditional definition of sovereignty as an "absolute, and uncontrollable" form of power—a definition traceable to Jean Bodin and Thomas Hobbes, but also present in the writings of Sir William Blackstone. Sovereignty in this sense remains unitary in nature; it can only be found in one location. But second, Wilson shifts that location from government to the people themselves, and allows it to be expressed only through the deposit of individual sovereign powers in different levels or branches of government. The people's sovereignty appears when they consent to fundamental constitutional arrangements, including the division of power between national and state governments. In this sense Wilson was illustrating this Court's well-known description of the capacity of American federalism to "split the atom of sovereignty." *U.S. Term Limits* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Third, Wilson imagines the constitutional exercise of popular sovereignty as an ongoing although episodic endeavor. "It is true the

exercise of this power will not probably be so frequent, nor resorted to on so many occasions in one case as in the other." 2 DHRC, at 473). The power may well lie dormant for long periods, but it never disappears.

Writing within the context of the debates of 1787-1788, Wilson was primarily concerned with refuting the charge that the Constitution would erode or destroy the states' sovereignty. But this doctrine, which other Federalists rapidly embraced, was as applicable to the states' internal governance as it was to the problem of federalism. Just as the American people were free to reallocate power between the national government and the states, so the people of Pennsylvania remained free to reconsider the design of their own constitution. That is exactly what they did in 1790, when the radically democratic constitution the state had adopted in 1776 was replaced by a new text that brought it much closer to the prevailing forms of American constitutionalism.[7]

The development of the initiative process was not, of course, a method of governance that Wilson could have actively considered in 1787. Nor was he then immediately concerned with discussing the internal governance of a state. But the idea that the sovereign people of a state might transfer the politi-

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[7] One significant achievement of the 1790 constitution was thus to convert the Pennsylvania assembly into a bicameral legislature. But had the people of Pennsylvania decided to create an independent commission to conduct the work of redistricting, that would have been a legitimate exercise of their sovereign power, because they would have entrusted this legislative power to a special institution, just as they had once created a Council of Censors to monitor deviations from their original (and deeply controversial) constitution of 1776.

cally charged task of ensuring their representation from a legislature whose workings they had come to distrust to an independent commission was fully consistent with the authoritative theory of popular sovereignty he laid down. Given the political context of 1787-1788, when the victorious Federalists were heaping so much obloquy on state legislatures, the idea of creating an independent commission to perform such a task would not have been inconsistent with this theory of the people's ultimate capacity to act constitutionally.

VI. The invention of the initiative process is substantially consistent with the founding generation's deeper understanding of the nature of delegated political authority, in which the power to legislate transcended the institutional legislature.

Wilson's definitive restatement of the doctrine of popular sovereignty carries special importance for its resolution of the peculiar problem posed by the innate character of American federalism. Yet this conception of the people's ultimate sovereignty also echoed themes that were already circulating in the Anglo-American constitutional tradition well before the momentous developments of 1787-1788. John Locke offered a definitive statement of the people's right to alter government as they wished in § 149 of the *Second Treatise of Government*. There was no question, Locke observed, that the legislative power was the highest (or "supreme") power of government,

> yet the Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supream Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust re-

> posed in them. For all Power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the Power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.

John Locke, *Second Treatise of Government* 367 (Laslett ed. 1964)

It is essential to note that Locke here speaks, not of the *legislature* as an institution, but of *legislative* power per se. That is the trust being delegated. It is the authority to make law, rather than the institutional contrivance of a legislature, that matters. When seventeenth- and eighteenth-century commentators spoke about legislative power, they were not merely reducing the authority to make law to a single institution. Their entire theory of government, which Locke so ably expressed, rested on the conviction that legislatures were a substitute for the people themselves. Of course, legislatures might well improve upon the deliberations the people at large might conduct. (This was manifestly James Madison's position in 1787-1788.) But the legislative powers that the people delegated always remained subject to popular review. And where the American constitutions offered the people mechanisms for revising this trust, and where the people's mature judgment led them to conclude that an institution was not operating optimally, the persistence of the states as autonomous jurisdictions permitted the people to reconstitute the trust of legislative power in new ways.

The great shift from Locke's era of resistance against arbitrary government to Madison's and Wil-

son's era of creative constitution making pivoted, in critical respects, on the ways in which a people could convey that trust. The Glorious Revolution of 1688-1689 confirmed the disputed principle of legislative supremacy while prohibiting the Crown from making law of its own willful authority. But it did not establish a new basis for erecting constitutional government. The American Revolution, however, did just that, first at the state level in the mid-1770s, and then nationally in the late 1780s. An event that Locke could only describe by reference to a distant state of nature became, in American hands, a workable set of procedures for distinguishing a constitution from ordinary law and conceiving how such a document could be amended over time.

In this process, Americans also learned to think more critically about the nature of the powers they were delegating and distributing among institutions. They entered the process of constitution making as faithful readers of Montesquieu's recent separation of the three departments of domestic governance: legislative, executive, and judicial. Their state constitutions and declarations of rights affirmed the principle that these three forms of powers should be kept separate and distinct. See Massachusetts Declaration of Rights Art. XXX (1780), 1 *Founders' Constitution*, at 13-14. But as Madison explained with some care in *The Federalist* No. 47, there were numerous ways in which the actual distribution of specific powers in the American constitutions did not conform to Montesquieu's broad dictum. Powers could be distributed among the branches of government in less tidy ways. They could also be reclassified in their very nature. As Article I, Section 8 of the federal Constitution readily confirms, powers long deemed

part of the royal prerogative in Britain became legislative in the United States.

All of this is consistent with the profound residual authority of the people to "alter the Legislative" when they conclude, through the well-defined procedures of the initiative, that a legislature's manipulation of its redistricting power is no longer adequately expressing their need for a just representation. For this reason, the decision by the people of Arizona to establish an independent redistricting commission is fully consistent with the political values underlying the Constitution, even if the legislative initiative had yet to be conceived in the 1780s.

CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted.

CHARLES A. ROTHFELD
Counsel of Record
JOSEPH P. MINTA
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com
Counsel for Amicus Curiae

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